

UNITED STATES FEDERAL COMMUNICATIONS COMMISSION

In The Matter Of:) EB Docket No. 02-21
)
PENINSULA COMMUNICATIONS, INC.) File No. EB 01-IH-0609
) FRN: 0001-5172-15
)
Licensee of stations)
KGTL, Homer, Alaska;) Facility ID Nos. 52152
KXBA(FM), Nikiski, Alaska;) 86717
KWW-FM, Holmer, Alaska; and) 52145
KPEN-FM, Soldotna, Alaska) 52149
)
Licensee of FM translator)
stations)
K292ED, Kachemak City, Alaska;) 52150
K285DU, Homer, Alaska;) 52157
K285EG and K272DG, Steward,) 52158 and 52160
Alaska)
)
Former licensee of FM)
translator stations)
K285EF, Kenai, Alaska;)
K283AB, Kenai/Soldotna,)
Alaska;)
K257DB, Anchor Point, Alaska;
K265CK, Kachemak City,
Alaska;
K272CN, Homer Alaska; and
K274AB and K285AA, Kodiak,
Alaska

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| Alaska |) | |

Room No. 363
Federal Communications
Commission
445 12th Street, N.W.
Washington, D.C. 20554

Wednesday,
September 25, 2002

The parties met, pursuant to **notice** at 9:00 a.m.

BEFORE: HONORABLE RICHARD L. SIPPEL
Administrative Law Judge

Heritage Reporting Corporation
(202) 628-4888

APPEARANCES:

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I N D E X

| <u>WITNESSES:</u> | <u>DIRECT</u> | <u>CROSS</u> | <u>REDIRECT</u> | <u>RECROSS</u> | <u>VOIR DIRE</u> |
|-------------------|---------------|--------------|-----------------|----------------|------------------|
| David F. Becker | -- | 255 | 360 | 423 | -- |
| (Resumes) | | | 442 | | |

E X H I B I T S

| | <u>IDENTIFIED</u> | <u>RECEIVED</u> | <u>REJECTED</u> |
|---------------------------------|-------------------|-----------------|-----------------|
| <u>Enforcement Bureau's:</u> | | | |
| EB-28 | 283 | 340 | -- |
| EB-29 | 338 | 339 | -- |
| EB-1 through 23 | 358 | 358 | -- |
| EB-24 | 358 | -- | 358 |
| EB-25 | 358 | 358 | -- |
| Official Notice Exhibits 1 - 20 | 358 | 358 | -- |

P R O C E E D I N G S

(9:00 a.m.)

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JUDGE SIPPEL: We are back in session. Counsel and the parties are present. Before we start, I want to just, if you can do this this morning, go over some -- what I call some interesting dates. Here is what I would like to do.

October 7, I would like to have Peninsula exchange its supplemental materials to the Bureau, I don't know what else to call them right now, and send a copy up to me. You know what I am referring to?

MR. SOUTHMAYD: Yes, sir.

JUDGE SIPPEL: Then by October 11th, the Bureau can respond if needed, and it's up to you, Mr. Shook. That's at your option.

On October 16th at nine a.m., I want to have an admissions session here in the courtroom.

MR. SHOOK: Now is that to cover just the supplemental material?

JUDGE SIPPEL: Well, unless there is something else that comes up.

MR. SHOOK: But I mean that's the basic idea is that --

JUDGE SIPPEL: That's correct.

MR. SHOOK: -- we will be covering the

1 supplemental material at that point?

2 JUDGE SIPPEL: That is correct. That is
3 absolutely correct.

4 Then using that as kind of the starting date,
5 November 26 would be proposed findings and conclusions.
6 That's just before Thanksgiving, and December 18th reply
7 findings and conclusions.

8 So I mean, if I don't hear anything further from
9 the parties on those dates, I will incorporate those in an
10 order when we finish here this week. But if you want to
11 talk to one another about it or get back to me between now
12 and then, that's fine too.

13 MR. SOUTHMAYD: Okay.

14 JUDGE SIPPEL: In fact, I was thinking as I was
15 thinking this through with the dates and what was
16 transpiring here that little -- what was it, that little
17 children's story or something about come into my parlor said
18 the spider to the fly. It's new material coming in to
19 supplement what you are putting in.

20 Anyway, we now have further testimony from Mr.
21 Becker. Would you come forward and take the stand, sir? I
22 won't swear you in any further because you are already
23 sworn

24 THE WITNESS: Okay

25 JUDGE SIPPEL: Please be seated. Make yourself

1 comfortable.

2 Whereupon,

3 DAVID F. BECKER

4 having previously duly sworn, was recalled as a
5 witness and was examined and testified further as follows:

6 JUDGE SIPPEL: Mr. Shook, are you ready? Well,
7 tell Mr. Shook when you are ready to go?

8 THE WITNESS: I'm ready.

9 CROSS-EXAMINATION (Resumes)

10 BY MR. SHOOK:

11 Q Mr. Becker, could you please take your own binder?
12 I will be going through that basically?

13 A This?

14 Q Right. You may have to periodically refer to the
15 others, but I will tell you when.

16 THE WITNESS: Is that okay if I --

17 JUDGE SIPPEL: Oh, yes, sir. Go right ahead.

18 BY MR. SHOOK:

19 Q Now, we have probably covered to some extent some
20 of the questions that I am going to ask today, but these
21 questions are pretty much focused in response to what you
22 have in your own statement.

23 so with that as background, I would **like** you to
24 first focus on your PCI Exhibit 1, which is your direct
25 testimony, and the sentence that I want you to focus on for

the purpose of this question is the second to the last sentence in the first paragraph. It's the sentence that reads, "The stark reality," et cetera.

A Yes.

Q Has any court agreed with the argument that had PCI obediently turned off the seven FM translators 16 months ago in order to do so by the Commission our appeal would have been over four months ago?

A No court has made a ruling on that yet that I'm aware of.

Q **Now** next I would like you to turn to page 2.

JUDGE SIPPEL: This is all PCI Exhibit 1?

MR. SHOOK: Yes, sir.

BY MR. SHOOK:

Q And the sentence is in basically the middle of the second page, it reads, "Additionally, I would like to explain the reasons for building these translators in Alaska and why PCI has taken the action it has to defend its licenses and property **from** the unlawful actions of the FCC."

First off, which FCC actions are you referring to?

A Our appeal before the **DC** Circuit Court goes all the way back to '96. So it's a review of all of the actions having to do with our **license renewal applications** that **were** filed in '95.

Q So I am going to refer now to the official notice

1 exhibit so I know what you're talking about here.

2 So in terms of the unlawful actions, the first one
3 that you are focusing on is the official notice Exhibit 7?

4 A It's my understanding that it starts -- this whole
5 matter is a renewal proceeding, and it begins, I understand,
6 with the renewal process which was our applications that
7 were filed for -- that were filed for the February renewal
8 starting in '96. And it would begin then with the Linda
9 Blair letter and goes through the whole process.

10 Q So it would include official notice Exhibit 7 and
11 8?

12 A Eight, yes.

13 Q Nine?

14 A Yes.

15 Q Ten?

16 A Yes.

17 Q Eleven?

18 A Yes.

19 Q Twelve?

20 A Yes.

21 Q And 13?

22 A Yes.

23 Q Has any court yet determined that any one of those
24 FCC actions that we have just talked about *is* unlawful?

25 A The appeals court, D.C. Circuit Court **of** Appeals

1 determined that the February 2000 order was not final.

2 Q That wasn't my question. My question was has any
3 court yet determined that any of the actions that we just
4 looked at is unlawful.

5 A It's a legal question. I'm not sure I'm qualified
6 to answer that.

7 Q Well, this is simply whether you are aware of
8 whether any court has made such a determination. If you are
9 not aware or don't know, you can certainly say so.

10 A I'm not an attorney, so at this point I would say
11 I don't know.

12 My -- may I supplement that?

13 Q Sure.

14 A My belief is that the orders are unlawful, so I
15 would correct that to say that my belief is that they are
16 unlawful.

17 Q All right, moving down toward the bottom of page
18 4.

19 JUDGE SIPPEL: Excuse me just a minute. I want to
20 be -- so that for record purposes, what you are really
21 saying is is that it's not from the unlawful actions of the
22 FCC, but from the "believe to be unlawful," right?

23 THE WITNESS: Yeah, it's --

24 JUDGE SIPPEL: That's what I heard you say.

25 THE WITNESS: Right.

1 JUDGE SIPPEL: Did I hear you wrong?

2 THE WITNESS: I believe the actions to be
3 unlawful. It's yet to be determined whether the D.C.
4 Circuit Court agrees with that. So that's my --

5 JUDGE SIPPEL: So then it would fully yet to be
6 determined an unlawful action. Actions of the FCC which you
7 believe to be unlawful and which are yet to be determined by
8 the court?

9 THE WITNESS: Yes, that would be fair.

10 JUDGE SIPPEL: Okay. I'm sorry. Go ahead, Mr.
11 Shook.

12 BY MR. SHOOK:

13 Q In terms of just -- this is more for background at
14 this point. When Peninsula first applied to get a radio
15 license from the Commission, which ended up being the
16 station that we know now as KWW-FM, what other stations, if
17 any, served Homer?

18 A None.

19 Q None.

20 Before KWW-FM actually came on line, were any
21 other stations serving Homer?

22 A Yes.

23 Q What station or stations?

24 A KBBI-AM came on the air in August of 1979, and
25 KSRM's translator was -- it was, I think, functioning by

1 August of 1979.

2 Q KBBI is a non-commercial station?

3 A It is actually a commercial station owned by a
4 nonprofit corporation which operates it as a non-commercial,
5 but it does have the commercial Am radio station license.

6 Q But in terms of being a competitor of Peninsula,
7 was KBBI a competitor from day one?

8 A Absolutely. Of course.

9 Q A competitor in terms of not only vying for
10 audience but for the advertising dollars that could come
11 from that market?

12 A Absolutely.

13 Q Even though it was a non-commercial station?

14 A Absolutely. They **sell** time just like anybody
15 else. They call it grants, or I think it's mostly they sell
16 programs or grants, but they do sell air time, and they go
17 out and solicit advertising from businesses in the form of
18 mentions, but it's still advertising, and took a significant
19 amount of money out of the market.

20 Q I would like you to now turn to page 3 of your
21 testimony.

22 A Yes.

23 THE WITNESS: **May I get my pen?**

24 JUDGE SIPPEL: Certainly.

25 //

1 BY MR. SHOOK:

2 Q The sentence that I would like you to focus on at
3 this point is in the middle of that first paragraph, and it
4 reads, "This is why I was deeply troubled by the FCC's
5 unprecedented order terminating our operation when our
6 Federal Court appeal was timely filed and pending."

7 Now, we did speak about this a little bit
8 yesterday, but not necessarily in the context of this
9 statement. And I want to clarify your understanding of the
10 timing of various matters

11 We have established that the FCC order was
12 released May 18, 2001, correct? That's what appears in
13 official notice document 13.

14 A Yes.

15 Q And your appeal of that order came approximately
16 four weeks later, did it not?

17 A Within 30 days under 408

18 Q So there was a period of time when Peninsula could
19 have complied with the Commission order prior to filing its
20 appeal if it -- if it believed that the appeal somehow put a
21 halt to the effectiveness of the FCC order?

22 A Well, the appeal indisputably puts a halt to the
23 effectiveness of the FCC order. Once the appeal is filed
24 under Section 408, then --

25 Q You mean 402, right?

1 A Under 402, but within the time frames specified in
2 408, then the other sections of that Chapter 5 come into
3 play which are Sections 405 as well as 402, and that leads
4 us to 307(c)(3), which permits continuing authority to
5 operate with licenses which continue in effect. So there is
6 no need to turn off.

7 Q Now the next sentence reads, "I certainly did not
8 relish the position I was placed in by the FCC by denying
9 two requests for a stay of its actions against the PCI
10 translators while our appeals were pending before the court,
11 and being forced to keep our translator stations on the air
12 to protect the viability of PCI's appeal."

13 Could you clarify for us which to requests were
14 stayed you are referring to, and when those requests were
15 filed?

16 A I'm not sure I can. We filed so many stays.

17 No, I can't. It must be in the record somewhere,
18 but I can't tell you.

19 If I may, I'll try -- I will attempt to answer the
20 question.

21 We filed for a stay of the May 2001 order, we
22 filed for an emergency stay of the February 2000 order. So
23 those would be the two stays that would *be* referred to here,
24 and in addition, there were stays before the Alaska District
25 Court in the 9th Circuit and so on. So there was a lot of

1 stays. But I think the two here that I had in mind are the
2 stay for the -- actually, no. We didn't file a stay for the
3 May 21 order until just recently.

4 So it would be the emergency stay for the 2000
5 order, and we did file a stay for the '98 order. It would
6 be those two stays.

7 Q The first of which was denied by the Court of
8 Appeals in March of 2000, and the second of which was --

9 A No, there was a stay before the emergency stay. I
10 believe we filed for a stay of the '98 order as well. I
11 think that's the best of my recollection.

12 Q Now what understanding do you have as to the
13 impact of a filing for a stay or a request for stay on an
14 entity's obligation to obey an order?

15 A Well, a stay does not preclude the necessity to
16 obey an FCC order. I hope I --

17 Q The filing for a stay does not?

18 A Yes, the filing for a stay doesn't mean that you
19 still don't have to obey the order. I understand that.

20 Q Now reading on in that paragraph you basically
21 indicate that you were forced to keep the translators on the
22 air to protect the viability of Peninsula's appeal.

23 And in *light of the actions that Peninsula took in*
24 1997, to arguably protect the viability of the Kodiak
25 translator, K274AB, which had gone off the air due to the

1 Air Force's action, isn't it true that you understood that
2 continuous operation of the translators was not necessary to
3 preserve those licenses?

4 A There was -- okay, I am confused by the question.
5 Could you restate it?

6 Q You will recall that we talked yesterday about the
7 Kodiak translator situation.

8 A Mm-hmm.

9 Q And one of those translators had actually gone off
10 the air.

11 A Yes.

12 Q And had it not been for some test of the satellite
13 delivery method of delivering the KPEN signal to K274AB, the
14 period of time in which that translator was off the air
15 would have exceeded 12 consecutive months?

16 A Yes.

17 Q So there was a break in that 12 consecutive months
18 because of the satellite delivery, correct?

19 A Yes.

20 Q Now with that understanding, weren't you aware
21 that continuous operation of the translators was not
22 necessary to preserve the licenses? All you had to do was
23 come on the air at some point?

24 A Well, why should I keep them off when I have
25 continuing authority to operate under 307(c)(3)? Plus the

1 February 2000 order was a non-final order, so I had
2 authority in addition to operate under 1.62. So I am a
3 broadcaster. My desire and purpose is to be on the air. I
4 don't make a living for my family by being off the air. I
5 don't serve the public interest by being off the air. I am
6 supposed to be on the air in the public interest.

7 So I wouldn't turn off for any reason other than,
8 as I am now, when a court told me to shut them off, I am
9 obeying the order and I am off the air. It's not my desire
10 though. I mean, that's not why I am here is to stay off the
11 air. I am here to be on the air.

12 Q In terms of complying with the court's order,
13 since you bring that up, there was a period of time in
14 October of 2002, wasn't there, when the court injunction had
15 been issued by the District Court but a stay had not yet
16 been issued by the United States Court of Appeals for the
17 Ninth Circuit? Wasn't there a period of about five days
18 when that was the case?

19 A You have the date incorrect. You said 2002. That
20 has not occurred yet.

21 Q 2001. Excuse me.

22 A All right. October of 2001, we were still
23 functioning under the February 2000 -- sorry -- October
24 2001, we had continuing authority to operate under 307(c)(3)
25 from the moment we filed, timely filed our appeal under 402

1 we came under the continuation pending the decision
2 provision of the Communications Act, 307(c)(3), and from
3 that point on we had continuing authority to operate whether
4 or not a stay was granted or not.

5 The whole business about the stay was the
6 enforcement action to get an injunction to make -- to force
7 me off the air, and in fact, the most recent motion for a
8 stay before the D.C. Circuit Court of Appeals was simply
9 with regard to getting the injunction stopped. If that
10 injunction had never been issued, I would be continuing to
11 operate today under authority of 307(c)(3). I would be on
12 the air right now under 307(c)(3).

13 Q I'm not sure that -- I'm not sure that you really
14 answered the question that I had. I will try to restate it
15 or rephrase it.

16 A Yeah, the five-day period is -- I'm sorry if I
17 interrupted.

18 Q Well, the -- I don't know. Had you finished your
19 answer?

20 A Yeah. You were addressing some five-day period of
21 time

22 Q Correct.

23 A And that's immaterial because in my mind it begins
24 within the window, *see, of* -- the order came out in May
25 18th. We had a 30-day window under 408 under which to file

1 our appeal. Okay, as soon as our appeal was timely filed
2 under 408, the other provisions -- if you read 408, the
3 other provisions of that sections say that there are other -
4 - you have the 30-day thing, but there are references to
5 other provisions of the chapter which kick in.

6 And the other provisions under Chapter 5 include
7 402 and 405. If your appeal is filed under 402, it comes
8 under the scope of 405. 405 comes under the scope of
9 307(c) (3). 307(c) (3) grants you continuing authority to
10 operate with licenses which continue in effect.

11 And the moment your appeal is filed you have
12 continuing authority from that point on to remain on the air
13 pending finality of a decision, which includes judicial
14 review.

15 So from the beginning of when our appeal filed,
16 which was timely, within that 30-day window, we had
17 Continuing authority from that point on.

18 The whole issue about stays always in regard to
19 injunctions, which were attempting to force us off the air,
20 had nothing to do with our authority to continue to operate
21 after the May 18th order of 2001.

22 Q I think I am following you, but I'm not so sure.
23 So I just want to clarify something.

24 Explain to me, if you can, the difference between
25 your mindset and actions of October 17, 2001, when the

1 United States District Court for the District of Alaska
2 issued a preliminary injunction against Peninsula's
3 continued operation of the seven translators to October 22,
4 when the Court of Appeals for the Ninth Circuit issued a
5 stay of that preliminary injunction. That's one set of
6 actions.

7 You stayed on the air at that point, correct?

8 A Yes.

9 Q Now, we come to 2002, and the District Court's
10 preliminary injunction has been affirmed by the Ninth
11 Circuit.

12 A Mm-hmm.

13 Q Correct?

14 A Yeah. Well --

15 Q And the -- and Peninsula has attempted to get a
16 stay of some kind from the District of Columbia Court of
17 Appeals.

18 A Mm-hmrn.

19 Q Which was denied.

20 A Yes.

21 Q Now after that denial, Peninsula finally turned it
22 stations off.

23 A That is correct.

24 Q So what I am trying to --

25 A What are the differences?

1 Q Yes. What is the difference?

2 A Okay, here *is* the difference.

3 My counsel, Kent Jacobus, was in communication
4 with Timothy Burgess, the U.S. district attorney, and they
5 had discussions, the fact that we were going to appeal to
6 the Ninth Circuit, that we would be immediately seeking a
7 stay. And through their discussions they basically decided
8 that there was nothing required to be done at that point in
9 time for that five days.

10 And if you will look at it, the stay issued, I
11 think, the following Monday. It was almost immediately. It
12 was just about as quickly as you could get an emergency stay
13 issued.

14 And under the same kind *of* agreement when the
15 injunction came about to be issued by mutual agreement
16 between the U.S. district attorney and my counsel, they
17 agreed to let me stay on the air through the end of the
18 elections. We were right in the middle of a primary
19 election process, and they agreed to let me operate up and
20 through August 28th -- the primary was August 27th --
21 because we had candidates that had bought time in the
22 stations and they were counting on the stations to get their
23 message out. It was a mutual agreement thing that said it's
24 no big deal. We'll turn off as soon as the primary is over.
25 And you know, we could have -- we should have maybe turned

1 off what, seven days earlier or something, but they agreed
2 that it was fine, and the court eventually issued an order
3 that reflected the August 28th date.

4 And all I can say is at the time these things were
5 worked out, and we did get the stay issued almost
6 immediately, like within five days. The district attorney
7 was comfortable with that. He wasn't going to prosecute me
8 for staying on the air. And it was -- that was how it was
9 resolved.

10 And we got the emergency stay right after that,
11 and we operated under that emergency stay as far as the
12 injunction goes, but my position is I had authority to
13 operate until this injunction basically fully kicked in and
14 actually forced me off the air, which is where I am in right
15 now.

16 Q So your understanding in October of 2001 was that
17 for the five-day period that -- following the issuance of
18 the preliminary injunction and prior to the issuance of the
19 stay by the Ninth Circuit, that you were not going to be
20 prosecuted if you stayed on the air?

21 A Yes, because they -- there was discussions with
22 the U.S. attorney. My counsel informed them that, yes, we
23 are taking our appeal to the Ninth Circuit. **We** were asking
24 for an emergency stay. He wasn't in any big hurry to make
25 me -- force me right off the air within a matter of a day or

1 so. He was willing to grant us a little bit of slack, which
2 is what he did, and we did get the emergency stay almost
3 immediately. It was within this five-day period. I mean,
4 five days is phenomenal for getting a stay on any basis.

5 Q Now moving down to the last sentence of the first
6 paragraph on page 3, you indicate that the forfeiture action
7 and current action have implicated the constitutional
8 protection against double jeopardy.

9 Do you see that?

10 A Yes.

11 Q Has any court held such a view?

12 A I don't know.

13 Q I would like to move to page 4.

14 JUDGE SIPPEL: Before you go on there, let me, if
15 I can, I have something on my mind.

16 If you had not gotten a stay from the District
17 Court injunction as you've testified, would you have stopped
18 broadcasting?

19 THE WITNESS: If I had not gotten the stay, the
20 injunction would have issued and I would have been off, yes.

21 JUDGE SIPPEL: Go ahead, Mr. **Shook**.

22 BY MR. SHOOK:

23 Q Now the last, the very last sentence of the first
24 paragraph --

25 A I'm sorry. Which page are you on?

1 Q Page 4 of your exhibit

2 A Right.

3 Q PCI 1.

4 A Yes.

5 Q Where you talk about the loss of \$140,000 in the
6 first four years.

7 Just so I understand the nature of this loss, was
8 that -- how did this loss work? Was that cash flow or what
9 kind of loss are we talking about here?

10 A If you go back and look at all of our tax returns
11 for that four-year period, and you add up what our losses
12 are, it would be 140,000 in round numbers or pretty close.

13 Q Now this is during a period when you put what is
14 now KWVV-FM on the air -- I guess then it was known as
15 KGTL-FM -- you constructed an **AM** station, correct?

16 A We did.

17 Q You applied for an FM translator to serve Kenai
18 and Soldotna?

19 A Yes.

20 Q And you were also busy assisting the application
21 of a Kodiak church to construct a translator?

22 A I had -- that was not an expense to me, but I
23 assisted them with it, yes.

24 Q **And** then in October **of** 1982, you and your wife
25 bought out your two partners?

1 A Yes.

2 Q Let's move on to page 5 of your testimony. It's
3 in the regular type, not the bold type paragraph, the
4 sentence reads, "At the time Kenai and Soldotna was served
5 by only one commercial FM service, KQOK-FM."

6 At that time in Kenai and Soldotna, there was also
7 an AM station, wasn't there?

8 A Yes. At that time there was KSRM-AM, and I have
9 already mentioned that previously, I believe. Yes.

10 Q And in terms of --

11 JUDGE SIPPEL: Would you say that again so I can
12 get it, KSRM?

13 THE WITNESS: KSRM.

14 JUDGE SIPPEL: Thank you.

15 BY MR. SHOOK:

16 Q And the next sentence, "...when PCI reasoned it
17 would be in the public interest to add a commercial FM
18 service."

19 Isn't it also true that it would serve Peninsula's
20 private interest?

21 A Well, we are in business. It's supposed to.

22 Q That's a yes then, right?

23 A Yes.

24 Q Now in the same paragraph, in terms of the process
25 for the grant of the translator that ended up serving the

1 Kenai/Soldotna area, you indicate that no questions were
2 asked.

3 Didn't the Commission staff send Peninsula a
4 letter that requested additional information in connection
5 with the construction permit?

6 A It's not my recollection. This is 20 years ago.
7 I don't recall getting a letter. It's possible. I don't
8 recall.

9 Q Didn't the letter tell you that if -- that if KQOK
10 objected either before or after construction, that there
11 could be a problem for this translator?

12 A I don't know. Can you produce the letter?

13 Q I can. It's upstairs at the moment. I will have
14 to get it.

15 But the basis for this testimony then is that you
16 didn't remember that such a letter was sent?

17 A I didn't -- no, when I wrote this I didn't
18 remember any letter.

19 Q Okay, when you wrote this did you have records
20 that you could review and check to determine whether what
21 you were saying was factually accurate?

22 A I did, but I -- to the best of my recollection, I
23 didn't -- that never entered into it. I didn't remember the
24 letter, so I wouldn't have thought to go look to find it.

25 MR. SHOOK: Your Honor, not to leave a hole in the

1 record, I will bring that done at either the break, the
2 letter that I am referring to, and then add it into the
3 record at that point.

4 JUDGE SIPPEL: Very fine. Appreciate that.

5 Now, this is all -- this letter, testimony about
6 this letter all has to do with the verification of the fact
7 that he testifies to here, that "at the time Kenai/Soldotna
8 was served by only one commercial FM service, KQOK-FM"? is
9 that correct?

10 MR. SHOOK: Yes, and it carries on down two other
11 sentences where it says, "The Commission granted our
12 application, no questions asked."

13 JUDGE SIPPEL: I see. Thank you very much.

14 BY MR. SHOOK:

15 Q Now focusing on the last sentence of that
16 paragraph, I want to go over this to make sure that we are
17 not mixing up the two translators that are being referenced
18 here.

19 And it was my understanding that the initial
20 translator that was put on the air was the one that served,
21 ultimately served Kenai and Soldotna, and until very
22 recently operated on Channel 283, whereas the translator
23 that was viewed as a new translator was the one that was
24 built at Kenai on Channel 285.

25 And to help you with that, if you would look at

1 our exhibits, the EB exhibits. If you look first at EB
2 Exhibit -- the tab 6, specifically beginning at page 17.

3 A Okay, I found it.

4 Q Okay, **if** you read through the cover letter,
5 specifically in the first paragraph, and then if you check
6 the application that follows, it appears that the way
7 Peninsula viewed the matter was that the translator that was
8 on Channel 285 and serving Kenai and Soldotna, that what you
9 were going to do here was modify that license in order to
10 have that translator focused primarily on Soldotna.

11 A No.

12 Q All right. Well, explain to me what's going on
13 then.

14 A Oh, the frequency was changed from 285 to 283.
15 The translator still was licensed to both Kenai and
16 Soldotna. It's only a frequency change.

17 And to clarify, I think the problem here with my
18 testimony is the channel was 104.9. 285 was actually moved
19 to Kenai, and the translator itself though actually remained
20 where it was at in Kenai/Soldotna on 283. So this is maybe
21 a little misleading. The channel itself went to Kenai
22 because we took the Kenai/Soldotna translator, moved it to
23 283, remained serving Kenai/Soldotna, and 104.9 moved over
24 to Kenai.

25 So this is probably factually incorrect because

1 the translator that was Kenai/Soldotna didn't actually go to
2 Kenai. It remained there. But the frequency that was used
3 went to Kenai/Soldotna.

4 Q Now moving on to the next paragraph on page 5 of
5 your statement, there is a reference to three commercial FM
6 services in Homer being better than two, and then ultimately
7 you are able to get additional translators there in the
8 Homer area.

9 The grants for those Homer area translators were
10 all made by the Commission's staff, correct?

11 A I don't --

12 Q As opposed to the full Commission?

13 A I don't know.

14 Q You don't know?

15 A I mean, I got licenses. That's all that mattered
16 to me. I don't know.

17 Q I mean, do you distinguish between the Commission
18 and the Commission staff?

19 A No. If the Commission staff acts under delegated
20 authority, I assume it's the FCC. That to me is the FCC,
21 whether it's the staff or the Commission, it's the FCC.

22 Q You understand that when the Commission issues an
23 order and it makes a mistake, that that mistake can be
24 corrected by the Court of Appeals, correct?

25 A Yes. Oh, sure.

1 Q Do you also have an understanding that the
2 Commission staff can make mistakes, and who is it that would
3 correct those mistakes?

4 A Well, the mistakes, if they are made, there is --
5 under 408, there is the 30-day window. If the Commission
6 issues an order and it has a mistake in it, they have 30
7 days to fix it. After 31 days, the order is final and it's
8 a done deal unless the court fixes it later on.

9 Q My question was what understanding you had in
10 terms of --

11 A That's my understanding.

12 Q -- if the Commission staff makes a mistake, and
13 whether the Commission itself has the ability to correct
14 that.

15 A I'm not a lawyer. I assume if the Commission
16 makes a mistake, they have got 30 days to fix it within 408.
17 If it doesn't get fixed, the order becomes final, and it's a
18 done deal from that point on unless the court at some point
19 intercedes and changes it.

20 Q Now just to clarify the situation when you were
21 seeking the additional translators in the Homer area.

22 Isn't it true that when Peninsula sought the
23 construction permits for the three Homer area translators to
24 rebroadcast KPEN-FM the only entity that could have objected
25 was Peninsula itself?

1 A That is correct.

2 Q Later on in the paragraph there is a reference to
3 the purchase of a Kodiak translator, and do you see that?

4 A Yes.

5 Q Now with respect to the translator Peninsula
6 purchased from the Kodiak Community Church, that being the
7 K285AA translator, what significance, if any, was there to
8 the fact that Peninsula was allowed to continue to
9 rebroadcast KGTL-FM?

10 A I don't understand your question.

11 Q Well, you belay here that the Commission approved
12 a translator for KGTL-FM licensed to Kodiak and owned by the
13 Kodiak Community Church. PCI subsequently purchased the
14 translator from KCC. PCI desired to maintain the service to
15 Kodiak. There was no ownership restriction at the time
16 since this translator did not fall within the signal contour
17 of any other commercial FM station serving Kodiak.

18 A I believe the sentence "to maintain service to
19 Kodiak" was stricken from the record.

20 Q No. What was stricken was the portion "when it
21 became evident that the church did not want to pay for the
22 ongoing expenses."

23 A What I have here is -- what I have marked out is
24 "When it became evident that the church did not want to pay
25 for the ongoing expenses of operating the translator and PCI

1 desired to maintain the service to Kodiak" is what I have
2 stricken.

3 Is that wrong?

4 Q Well, the "PCI desired" part is still in.

5 A It is?

6 Q Yes.

7 A Are you sure?

8 Q Yes.

9 JUDGE SIPPEL: Well, it is now.

10 (Laughter)

11 MR. SHOOK: Certainly that was what I was
12 objecting to before. I didn't object to what PCI, you know,
13 felt, thought, desired. It was the other entity.

14 THE WITNESS: Okay. I'm sorry. I incorrectly
15 deleted that.

16 MR. SHOOK: All right. Well, I got a little
17 carried away perhaps the first time around, and it wasn't
18 just you.

19 JUDGE SIPPEL: I made the same mistake.

20 MR. SOUTHMAYD: **Me** too.

21 JUDGE SIPPEL: Okay.

22 THE WITNESS: All right, so what's your question?

23 BY MR. SHOOK:

24 Q All right, I wanted to know what the significance
25 of Peninsula being allowed to continue to rebroadcast KGTL-

1 FM at the time it purchased the translator from the Kodiak
2 Community Church.

3 A Well, the significance is the translator stayed on
4 the air, otherwise it probably would have been shut off as
5 the church was contemplating not paying the expense anymore.
6 And my assumption would be that it would have gone away. So
7 we kept it. We bought it and kept it on the air, and we
8 maintained the service to Kodiak

9 Q Well not only did you maintain the service to
10 Kodiak, but you also were able to maintain relationships
11 with advertisers that had been developed while the church
12 owned --

13 A Yes

14 Q -- the translator?

15 A Of course.

16 Q And basically when the translator K285AA was
17 purchased from the Kodiak Community Church, then Section
18 74.1232(d) of the rules wasn't even implicated because there
19 was no other commercial FM service in Kodiak at that time.

20 A That is correct. The current version of the rule
21 did not -- as I understand the current version of the rule
22 at the time, you could put a translator anywhere you wanted
23 to in the whole State of **Alaska** as long as it didn't fall
24 within the primary contour of another commercial station.

25 Q And then with respect to the other Kodiak

1 translator, that being K274AB, although it had a different
2 call sign at the time it was originally built, didn't you
3 point out in the station's original construction permit
4 application that the prohibitions of Section 74.1232(d) of
5 the rules did not apply?

6 And I will point you to what I am referring to.
7 It's our Exhibit 4, EB Exhibit 4, if you would go to page 79
8 of that exhibit. And if you look at question eight and the
9 response that PCI give

10 A Okay, I see eight.

11 And what was your question, sir?

12 Q When you first applied for the translator that
13 ultimately became K274AB, Section 74.1232(d) of the rules
14 wasn't even implicated.

15 A I believe that's what we stated.

16 Q So in other words, when PCI acquired two Kodiak
17 translators, first by purchase, the other by its own
18 construction permit, the ownership restrictions of
19 74.1232(d) never came into play?

20 A That is correct.

21 Q Now moving on to page 6 of your testimony, if you
22 would read the first paragraph to yourself. It's the one in
23 bold time.

24 A I'm familiar with it.

25 Q When you refer to "mindset" and "policy," did you

1 get that information directly from any of the commissioners?

2 A No.

3 Q This is an inference that you're drawing from
4 staff actions?

5 A Yes.

6 Q I would like to move to the next paragraph which
7 focuses on the Seward situation.

8 MR. SHOOK: Your Honor, are we up to -- we're up
9 to EB-28, Your Honor, what our next --

10 JUDGE SIPPEL: Oh, the numbers on the -- you want
11 a number? That's correct.

12 MR. SHOOK: All right, Your Honor, I am going to
13 mark for identification as EB-28 applications that were
14 submitted by Peninsula for two translators to serve Seward,
15 Alaska, and the applications combined total 38 pages.

16 JUDGE SIPPEL: These are applications for say
17 again?

18 MR. SHOOK: Filed by Peninsula for new translators
19 to serve Seward, Alaska.

20 JUDGE SIPPEL: All right, those will be marked as
21 EB Exhibit No. 28 for identification.

22 (The document referred to was
23 marked for identification as
24 EB Exhibit No. 28.)

25 //

1 BY MR. SHOOK:

2 Q First of all, Mr. Becker, if you could verify the
3 signatures. The first signature that I want you to focus on
4 is the one that appears on page 8.

5 A That's my signature.

6 Q And there is also one that appears at page 21.

7 A That's my signature.

8 JUDGE SIPPEL: There is one on page 10 also.

9 MR. SHOOK: Well, there are probably others that I
10 haven't -- yes, on page 10.

11 THE WITNESS: Yes.

12 BY MR. SHOOK:

13 Q Also on page 29?

14 A Yes.

15 Q They are all your signatures?

16 A Yes.

17 Q Could you identify these documents, describe what
18 they are?

19 A This would be our applications to build two new
20 translators on Channel 272, and Channel 285 for Seward,
21 Alaska.

22 Q Now you can take all the time you need with
23 respect to this question. Can you tell us what in the
24 applications or in the cover letters, what specific rules or
25 what is it that PCI or Peninsula, rather, wants to have

1 waived by the Commission?

2 A The cover letter does not put specifics on it.
3 However, the application is abundantly clear what we were
4 asking for, and we did cite Wrangell Radio Group in the
5 cover letter, which had always been sufficient to get
6 applications granted in the past.

7 Q Well, now we did go over some applications
8 yesterday where there were specific waiver requests. For
9 example, there were a number that we looked at yesterday
10 where there were specific waiver requests for the power
11 limitations that had appeared in 74.1235.

12 A Yes.

13 Q There were also applications, and I could point
14 them out to you if need be, where there were specific waiver
15 requests for 74.1232(d) .

16 A Mm-hmm.

17 Q For example, the Kenai/Soldotna application in
18 1982 specifically requested a waiver of that provision,
19 correct?

20 I can go back and we look at it.

21 A Well, I don't know without checking.

22 Q All right. Well, let me just verify that that was
23 there. If you could turn to tab 6 of **the** EB exhibits.

24 JUDGE SIPPEL: Are you going to move this in?

25 MR. SHOOK: Yes, eventually.

1 JUDGE SIPPEL: All right.

2 THE WITNESS: Okay, I'm there.

3 BY MR. SHOOK:

4 Q I would refer you to page 41 of that exhibit.

5 A Yes.

6 Q The very first sentence there makes abundantly
7 clear that you are requesting a waiver of 74.1232(d).

8 A That's true, but it didn't apply to Seward. There
9 was no commercial FM station in Seward, so we didn't ask for
10 a waiver of 74.1232(d).

11 Q That was your understanding of the situation at
12 the time?

13 A Yes.

14 Q So aside from the freeze request, that is, or a
15 lifting the freeze rather than is mentioned in the second
16 paragraph of the cover letter, there were no other specific
17 request for rule waivers?

18 A Well, if you will **look** at page 18, Exhibit A-5, we
19 clearly represented that Peninsula Communications is both
20 the licensee of the station to be rebroadcast and the
21 applicant. It's not that we tried to fool the Commission.

22 Q I see that. That's on page 18?

23 A Yes. **And** there is probably another one further
24 back.

25 Q Now, I will say that there is a specific waiver

1 request that appears on page 19

2 A That's for power.

3 Q For power.

4 A I would point out that this is April of '91, and
5 the new revision of the translator rules were not effective
6 at that time.

7 Q Do *you* know whether they became effective while
8 this application was still pending?

9 A No.

10 Q You don't know?

11 A It's my understanding they didn't become
12 effective, the effective date was three years later, wasn't
13 it?

14 Q That was for preexisting translators, I believe.

15 A Oh.

16 Q And we know from your own PCI Exhibit 1(b) that
17 the grant of the Seward translators did not take place until
18 February of 1982, or 1992, rather.

19 A Exhibit 1(b)?

20 I don't have 1(b).

21 Q PCI Exhibit 1(b). It should be the letter that
22 was sent by the Commission staff to you.

23 A No.

24 JUDGE SIPPEL: The 18 February 1992?

25 MR. SHOOK: Correct.

1 THE WITNESS: Well, that's (b). Yes, I see it.

2 BY MR. SHOOK:

3 Q So in other words, the new rules became effective
4 while the Seward application was still pending?

5 A That's what the letter is all about, yes.

6 MR. SOUTHMAYD: Your Honor, I would like to raise
7 an objection. This line of questioning directly contradicts
8 evidence that has been submitted by the Bureau into the
9 record of this proceeding, and the facts are established
10 that Peninsula did in fact request waivers of that section
11 of the rules.

12 To the extent that they are testing Mr. Becker's
13 memory, which may not be very good since this happened in
14 1991, I guess it's not objectionable. But the whole line of
15 inquiry conflicts with an exhibit that the Bureau has put in
16 to the record, Exhibit 13, page 7, where the Commission
17 specifically finds in its own order that Peninsula requested
18 waivers of 74.1232(d) in connection with its Seward
19 applications.

20 So I object because I guess the line of
21 questioning is attempting to rebuke or throw into disregard
22 the Bureau's own testimony.

23 JUDGE SIPPEL: You're referring now *to* the
24 opposition to application for review at page 7?

25 MR. SOUTHMAYD: No. Official Notice 13, page 7,

1 paragraph 14 of the Commission's order.

2 JUDGE SIPPEL: I'm looking at the wrong place
3 here. Hold on. Exhibit 13 of the Bureau, I have an
4 opposition to application.

5 MR. SOUTHMAYD: This is the public notice,
6 Official Notice 13.

7 VOICE: The other binder.

8 JUDGE SIPPEL: Oh, you're in the -- I'm sorry.

9 MR. SHOOK: Everybody is having a hard time with
10 this.

11 VOICE: What number is this?

12 MR. SOUTHMAYD: Number 13, page I, paragraph 14
13 that appears on that page specifically says that, "In this
14 regard the staff had explicitly granted Peninsula waivers of
15 47 CFR 74.1231(b), and 74.1232(d). Waivers that we declined
16 to rescind in our December 1998 memorandum of order."

17 So the Bureau's exhibit confirms that those
18 waivers were granted. I object because this line of
19 questioning, apparently attempting to test Mr. Becker's
20 memory, is inappropriate based on the evidence they have
21 submitted to the contrary.

22 MR. SHOOK: Your Honor, there happens to be a
23 little difference in our thought processes here. Mr.
24 Southmayd correctly points out what it is that the staff
25 did. What I am focusing on is what Peninsula asked **for**.

1 JUDGE SIPPEL: Well, what the staff did when? You
2 mean what the staff did on May 18th? Well, that the
3 Commission that did that.

4 MR. SHOOK: No, what the staff did in February of
5 1992. The staff granted applications, and also issued
6 waivers and made statements about what it was that Peninsula
7 had requested.

8 I'm trying to find out when it was that Peninsula
9 had made such requests, how they made such requests

10 MR. SOUTHMAYD: Your Honor, if I could be heard.
11 This goes to the issue that I raised, and that's the subject
12 of Your Honor's order on supplemental submission. What has
13 been submitted here is the 1991 application. There were, I
14 believe, subsequent amendments to this application as late
15 as 1998.

16 So again what we are doing here is we're trying to
17 set a record on an application that was superseded by
18 subsequent filings, and based on Mr. Becker's ultimate
19 authorization these are irrelevant to the issue.

20 JUDGE SIPPEL: They are totally incomplete, in
21 other words.

22 MR. SOUTHMAYD: Yes.

23 JUDGE SIPPEL: Incomplete and --

24 MR. SOUTHMAYD: Yes, that's exactly right, and
25 that was *my* point. Had the entire file been provided, we